SUPREME COURT, U. S.

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No. 1077

IN THE

Supreme Court of the United States

October Term, 1969

JAMES P. KELLY and YNES KELLY
Appellants,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF IDAHO

MOTION TO DISMISS AND BRIEF OF APPELLEE THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY IN SUPPORT THEREOF

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Pursuant to Rule 16, Appellee, The Mountain States Telephone and Telegraph Company, moves to dismiss the appeal from the final judgment of the Supreme Court of the State of Idaho on the following ground:

The appeal does not present any substantial Federal question.

STATEMENT

The Appellee, The Mountain States Telephone and Telegraph Company, accepts as essentially accruate the Appellant's statement of the case set forth in pages 1-9 of the Appellants' Jurisdictional Statement.

BRIEF IN SUPPORT OF MOTION TO DISMISS

The Appeal Does Not Present Any Substantial Federal Question

The sole issue which is raised on this appeal is whether summary judgment procedure *per se* violates the Appellants' constitutional right of trial by jury. The Appellee believes that the question has already been resolved against the Appellants by the Court in its prior decision in *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315 (1902). There, the Court was faced with the question of the constitutionality of a summary judgment proceeding under Rule 73d of the then Supreme Court of the District of Columbia (now designated the United States District Court for the District of Columbia). The Court sustained summary judgment proceedings in the face of the attack that the defendant was thereby deprived of its constitutional right to a jury trial.

Another case in which the Court had the opportunity of discussing the right of trial by jury was *In Re Peterson*, 253 U.S. 300 (1920). There, the lower Court appointed an auditor for the purpose of resolving certain issues which were in contention between the parties. The plaintiff in the Trial Court sought a Writ of Prohibition against this procedure contending that it infringed the right to jury trial. The Court made the following statement:

> "The command of the Seventh Amendment that 'the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained. [citation] It does not prohibit the introduc-

tion of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

"In so far as the task of the auditor is to define and simplify the issues, his function is, in essence, the same as that of pleading. The object of each is to concentrate the controversy upon the questions which should control the result. [citation] No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right to a trial by jury to require, with a view to formulating the issues, an oath by each party to the facts relied upon. [citation] Nor does the requirement of a preliminary hearing infringe the constitutional right, either because it involves delay in reaching the jury trial, or because it affords opportunity for exploring in advance the evidence which the adversary purposes to introduce before the jury. [citation] In view of these decisions, it cannot be deemed an undue obstruction of the right to a jury trial to require a preliminary hearing before an auditor." pages 309-310

The *Fidelity* and *Peterson* cases appear to the Appellee to be determinative of the issue. However, as further support, we respectfully direct the Court's attention to *Nave v. City of Seattle*, 68 Wash. 2d 721, 415 P. 2d 93 (1966), appeal dismissed 385 U.S. 450, rehearing denied 386 U.S. 929 (1967). There, the plaintiff-appellant's suit was dis-

missed in the Trial Court on motion for summary judgment. He appealed to the Washington Supreme Court, raising the Federal Constitutional question of the denial of his right to trial by jury because of the summary judgment. The Trial Court decision was affirmed. On appeal to this Court, the case was dismissed "for want of a substantial federal question" at page 450.

Further, the Appellee believes this Court has already ruled indirectly in favor of the constitutionality of Rule 56 of the Idaho Rules of Civil Procedure. That Rule, as quoted by the Appellants in their Jurisdictional Statement, is practically a verbatim duplication of Rule 56 of the Federal Rules of Civil Procedure. The Court in at least two instances has upheld summary judgment proceedings under Rule 56 of the Federal Rules of Civil Procedure. *United States v. United States Gypsum Company*, 340 U.S. 76 (1950) and *Associated Press v. United States*, 326 U.S. 1 (1945). Admittedly, neither of these cases raised the specific issue of the constitutionality of Rule 56. However, it is assumed that if the Court had substantial reservations concerning the propriety of Rule 56 it could have and would have raised this issue. Its failure to do so, we believe, indicates that there is no substantial Federal question involved concerning the validity of Rule 56.

In passing, the Appellee believes that this appeal would more properly have been brought before the Court on a Petition for Certiorari under the provisions of Title 28 of the United States Code, § 1257. However, the Appellee also recognizes that the Court has the statutory authority, under Title 28 of the United States Code, § 2103, to consider the appeal as a Petition for Certiorari. Accordingly, the Appellee does not object thereto; but, in the event that the Court does wish to consider this as a Petition for Certiorari, the Appellee desires to tender the within Brief as its Brief in Opposition to the Granting of Certiorari pursuant to Rule 24 of this Court.

CONCLUSION

The sole question raised by this appeal; i.e., does summary judgment procedure infringe upon the constitutional right to a trial by jury, is not substantial having been previously resolved by the Court. It is respectfully submitted, that for these reasons, the appeal should be dismissed.

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January 22, 1970